

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7045

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

MARGIE L. UPTON, individually and as Administratrix of
the Estate of LARRY L. UPTON, deceased, and as Mother
and Natural Guardian of KARI LEE UPTON, KIM MARIE
UPTON and JODI LYNN UPTON, Minors, et al.,

Plaintiffs-Appellants,

v.

THE DEPARTMENT OF CIVIL AVIATION
OF THE EMPIRE OF IRAN,

and

THE EMPIRE OF IRAN,

Defendants-Appellees.

On Appeal from The United States District Court
For the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

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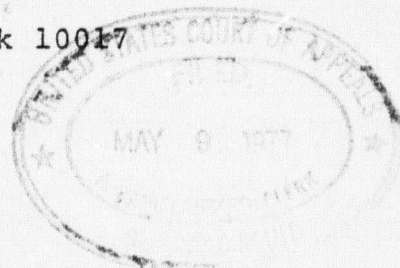


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BRIEF OF DEFENDANTS-APPELLEES

QUESTIONS PRESENTED

1. Whether, in light of the intervening enactment
into law of the Foreign Sovereign Immunities Act of 1976 (an

act defining the jurisdiction of the United States courts in suits against foreign states), any United States court has subject matter jurisdiction over an action brought against a foreign state where that action is based upon alleged wrongful death and personal injuries resulting from the collapse of a building owned and operated by that foreign state and located solely within that foreign state?

2. Whether the district court was correct in holding that it lacked any basis for the exercise of in personam jurisdiction over the Government of Iran and its Department of Civil Aviation on the basis of an alleged tort occurring wholly within Iran?

3. Whether the district court was correct in holding that service of process may not be properly and validly effected on a foreign state through any of the following means:

(a) Delivering the Summons and Complaint to a clerical/secretarial employee of the Consulate General of the foreign state, without having received the prior consent of the Consul General or his designee to accept such service or to enter the Consulate?

(b) Leaving the Summons and Complaint with an unidentified employee (who refused to accept the purported service) of a commercial airline company which is owned by the foreign state?

(c) Mailing a copy of the Summons (before it was signed and authorized by the clerk of the Court) and Complaint (before the filing of the Complaint in court), without translations of the documents into the official language of the foreign state, to the Embassy and Minister of Justice of the foreign state?

COUNTERSTATEMENT OF THE CASE

This is an action wherein the plaintiffs have attempted to sue the sovereign Government of Iran ("Iran") and Department of Civil Aviation ("the Department") on the basis of the collapse of the roof of the Mehrabad Airport Terminal Building in Tehran, Iran, on December 5, 1974.

Throughout these proceedings, Iran and the Department have expressly reserved their defense of sovereign immunity from suit and from the jurisdiction of the courts of the United States with respect to the matters alleged in the Complaint. (A. 19.) Iran and the Department appeared specially, through counsel, in the proceedings below for the sole purpose of moving to quash service of process and to dismiss this action for lack of in personam jurisdiction. (Def's Mem. of Law 1-2.) In filing this brief on appeal, Iran and the Department again expressly reserve their defenses of sovereign immunity from suit and from the jurisdiction of the courts of the United States

respecting the matters raised in the Complaint, and the filing of this brief is not to be construed as a waiver of such defenses.

* * *

Defendant, the Government of Iran, is a sovereign and independent state, having friendly diplomatic relations with the United States. Iran maintains an Embassy in the District of Columbia and a Consulate General in New York City.

The Department of Civil Aviation is a department of the Government of Iran and is responsible for the regulation of civil aviation in Iran. The Department's official responsibilities also extend to the administration, operation and maintenance of public airports in Iran, including Mehrabad International Airport in Tehran. Mehrabad Airport is a government-operated public airport, which is not operated for profit. Neither the Department nor any of its subdepartments engage in commercial activities in the State of New York or elsewhere in the United States. The Department does not maintain an office in the State of New York or elsewhere in the United States. (A. 23 ¶ 6.)

The action below was based upon the collapse of the roof of the Mehrabad Airport Terminal Building's main hall, which allegedly occurred on December 5, 1974 in Tehran, Iran. (A. 5 ¶¶ 4-6.) Plaintiffs concede that the effects of the terminal building roof collapse also occurred wholly in Tehran, Iran. (A. 103 ¶ 5.)

By letter dated June 29, 1976, addressed to Mr. Moshavegh-Zade, Office of the Legal Counsel, The Imperial Embassy of Iran, plaintiffs' counsel represented that he would attempt to have service effected in this action through personal service by the United States Marshall upon the following: (1) Iran National Airlines Corporation; (2) The Consulate-General of Iran; and (3) The Permanent Mission of Iran to the United Nations. Enclosed in that letter was an unsigned copy of the Summons and the Complaint in this action, which was subsequently filed with the district court on June 30, 1976. (A. 105 ¶ 11, 113 ¶¶ 2-3.)

On July 8, 1976, the United States Marshal left a copy of the Summons and Complaint at the Offices of Iran National Airlines Corporation ("Iran Air"), located at 845 Park Avenue, New York, New York. The United States Marshal's Return of Service does not list the name of any individual who was actually served at Iran Air, but acknowledges that the employee of Iran Air upon whom service was attempted "refused to accept service." (A. 112.) Iran Air is a corporation organized under the laws of Iran for purposes of engaging in commercial aviation (A. 147); it is financially and organizationally independent from the Government of Iran and is operated according to commercial principles (A. 152); it is not a department or ministry of the Iranian Government (A. 22-23 ¶ 4).

On July 8, 1976, the United States Marshall purported to effect service upon Iran and the Department by entering the Consulate General of Iran and leaving a copy of the Summons and Complaint with a clerical/secretarial employee of the Consulate General. The Marshal did not obtain the prior consent of the Consul General or his designee before attempting to serve process upon Iran and the Department by entering the Consular premises. (A. 22 ¶ 2.)

Plaintiffs also attempted to have the Summons and Complaint served upon Iran's Permanent Mission to the United Nations. Members of the Iranian Mission refused to accept the attempted service, and the United States Marshal withdrew without having delivered the Summons and Complaint. (A. 105-06 ¶ 12.)

On July 28, 1976, without waiving their sovereign immunity from suit, defendants appeared specially in this action and moved the district court to quash service of process and dismiss the Complaint for lack of in personam jurisdiction. (A. 19-20.)

THE DECISION BELOW

On December 20, 1976, the district court (Metzner, J.) entered its opinion and order granting defendants' motion on both grounds, quashing service and dismissing the Complaint. As the district court held, in part:

In this action plaintiffs seek to recover damages from the Empire of Iran ("Iran") and that government's Department of Civil Aviation ("Department") for an alleged tort which occurred solely in Tehran, Iran. . . .

* * *

The Department is not present in this country. No in personam jurisdiction is conferred over Iran or the Department by the presence of Iran National Air Line Corporation in New York. Iran National Air Line Corporation is neither a ministry nor a department of Iran.

* * *

This court can find no basis for exercising its jurisdiction over Iran and the Department based on a tortious act which occurred wholly in Iran. Accordingly, plaintiffs' action must be dismissed. (A. 189, 191.)

As will appear below, the district court was correct in reaching this conclusion and should be affirmed.

IMMUNITIES ACT

On October 21, 1976, Congress enacted into law the Foreign Sovereign Immunities Act of 1976 ("the Immunities Act")*, which is designated "an act to define the jurisdiction of United States Courts in suits against foreign states." (Immunities Act, Preamble, 90 Stat. 2891 (1976).) The provisions of the Immuni-

* Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602-1611). A copy of the Immunities Act is annexed to this brief as Appendix A.

ties Act became effective on January 19, 1977 (Pub. L. No. 94-583, § 8, 90 Stat. 2898 (1976)), after the district court decision had been filed. The Act confirms the validity of the dismissal of the Complaint herein. Section 1604 of the Act, 28 U.S.C. § 1604, provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Further, in Section 1602, 28 U.S.C. § 1602, which clearly deliniates the means by which the jurisdiction of United States courts over claims, as here, against foreign state is to be decided, the Act requires that: "Claims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter."

As will be discussed, the relevant principles set forth in the Immunities Act, which contains no provision excluding suits filed prior to its effective date, provide an additional basis for affirming the dismissal below.

ARGUMENT

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 HAS WITHDRAWN SUBJECT MATTER JURISDICTION OVER THIS ACTION FROM THE COURTS OF THE UNITED STATES.

A. The Immunities Act Precludes United States Courts from Exercising Jurisdiction over Foreign States in Cases based on Torts Occurring Solely within the Territory of the Foreign State.

Under the provisions of Section 1604 of the Immunities Act, 28 U.S.C. § 1604, sovereign immunity is now authoritatively equated with jurisdictional immunity. As that section provides in part: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." (Emphasis added.) Thus, no court of the United States possesses subject matter jurisdiction over an action against a foreign state except in the specific classes of cases enumerated in the Act.

Section 1605 of the Act, 28 U.S.C. § 1605, enumerates the classes of cases which are the sole exceptions to the jurisdictional immunity of foreign states. Those cases may be broken down into the following categories:

1. Cases where the foreign state has waived its immunity either explicitly or by implication. Section 1605(a)(1).

2. Cases based: a.) upon a commercial activity carried on in the United States by a foreign state; b.) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or c.) upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere where that act causes a direct effect in the United States. Section 1605(a)(2).

3. Certain cases in which rights in property are taken in violation of international law or are situated in the United States. Section 1605(a)(3) and (4).

4. Cases in which money damages are sought against a foreign state for personal injury or death or for damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that state. Section 1605(a)(5).

5. Certain suits in admiralty brought to enforce maritime liens against vessels or cargo of the foreign state. Section 1605(b).

This is an action against a foreign state seeking damages for wrongful death and personal injuries allegedly suffered as a result of the collapse of the Mehrabad Airport Terminal Building located in Tehran, Iran. Such an action does

not come within any of the enumerated exclusive categories of exceptions to the Immunities Act's statutory withdrawal of jurisdiction from the United States courts over actions against foreign states:

1.) Section 1605(a)(1) (waiver). The defendants have not waived their immunity from suit respecting the Mehrabad Airport incident. On the contrary, they have explicitly reserved their claim of immunity throughout this proceeding. (A 19.)*

2.) Section 1605(a)(2) (external commercial activities). This action is not based upon any commercial activity or other act carried on or performed in the United States by Iran or the Department. Nor is it based upon any commercial activity of the defendants that caused a direct effect in the United States. Rather, plaintiffs concede this action is based solely upon the allegedly negligent operation and maintenance of a public airport terminal in Iran and the collapse of the roof of that terminal. (A 5 ¶ 5.) That incident was not only

* The defendants first moved in the district court to dismiss this case on the basis of lack of in personam jurisdiction and improper service of process before moving for dismissal on grounds of sovereign immunity in accordance with the practice preferred by the State Department and the courts in cases decided before passage of the Immunities Act. See, e.g., Renhard v. Humphreys & Harding, Inc., 59 F.R.D. 530, 531 (D.D.C. 1973); Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Com., 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966).

unrelated to any commercial activity of the sovereign defendants,* but it also caused no direct effects in the United States. Any such effects of the incident occurred solely in Tehran, Iran. (A 103 ¶ 5.)** Thus, the exception of Section 1605(a)(2) has no application here.

3.) Sections 1605(a)(3) and (4) (certain rights in property). This case has nothing to do with rights in property taken in violation of international law or situated in the United States.

4.) Section 1605(a)(5) (noncommercial torts occurring in the United States). Both the statutory language and the legislative history make it clear that for jurisdiction to exist "the tortious act or omission must occur within the jurisdiction of the United States." (H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6605.) (Emphasis added.) Thus, Section 1605(a)(5) estab-

* Mehrabad Airport is operated by Iran for public purposes and not as a profit-making endeavour.

** The legislative history of the Immunities Act explicitly states that this exception was not intended to extend the exercise of United States jurisdiction beyond those circumstances where jurisdiction would be authorized under the principles of Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States. (See H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. reprinted in [1976] U.S. Code Cong. & Ad. News 6604.) Illustration No. 3 of Restatement § 18 makes it clear that, even if the plaintiff decedents herein had died in the United States -- and they did not (A. 103 ¶ 5), Iran would not be subject to jurisdiction in the United States.

lishes, in no uncertain terms, that Congress decided to codify the traditional principle that United States courts may not exercise jurisdiction over foreign states for torts occurring solely within the territory of such foreign states. Here, any tortious act or omission occurred wholly in Iran.

5.) Section 1605(b) (certain admiralty suits). This is obviously not a suit in admiralty, and therefore, Section 1605(b) is inapplicable.

Thus, a thorough examination of each of the categories established by Congress as exceptions to the general rule of jurisdictional immunity for foreign states establishes that none of those categories is applicable here. Furthermore, there is no possible dispute about the controlling facts in the record upon which that determination may be made: the collapse of the Mehrabad Airport Terminal and its direct effects occurred solely in Iran. (A. 103.) Since the Immunities Act withdraws the jurisdiction of United States courts from actions brought against foreign states based upon such an incident, the only remaining question is whether the Immunities Act applies to this case.

B. The Immunities Act Applies to this Case and Requires its Dismissal for Lack of Subject Matter Jurisdiction.

As previously noted, the Immunities Act became effective on January 19, 1977. (See pp. 7-8 supra.) The Act

provides no exception or "saving clause" which would allow United States courts to continue to exercise jurisdiction merely because a complaint had been filed prior to the effective date of the Act. By its terms, the Act specifies the only remaining bases for jurisdiction over foreign states; all others are withdrawn. Furthermore, the Act relates to the time when "claims of foreign states to immunity" are made (see Section 1602 of the Immunities Act, 28 U.S.C. § 1602), not to the time when a case against a foreign state is filed. Of course, it is black letter law that lack of subject matter jurisdiction may be raised at any time, even before the Supreme Court. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908); NLRB v. Swift & Co., 233 F.2d 226, 229 (8th Cir. 1956).

Accordingly, a court exercising appellate jurisdiction over a case from which Congress has withdrawn subject matter jurisdiction by statute must dismiss the action, regardless of when the withdrawal occurred. de Rodulfa v. United States, 461 F.2d 1240, 1251 n.56 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972); Van Horne v. Hines, 122 F.2d 207, 209 (D.C. Cir.), cert. denied, 314 U.S. 689 (1941); Smallwood v. Gallardo, 275 U.S. 56, 62 (1927); Hallowell v. Commons, 239 U.S. 506 (1916); Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868). As stated by the court in the Van Horne case, in closely analogous circumstances:

If, therefore, Congress has by the passage of the act withdrawn jurisdiction, it is of no consequence that the act became effective after the trial below and during the pendency of the appeal in this court, for the rule is well established that, where jurisdiction conferred by statute is prohibited by a later statute, jurisdiction ceases and causes pending at the time of the later enactment must be dismissed. See *Hallowell v. Commons*, 239 U.S. 506, 36 S. Ct. 202, 60 L. Ed. 409, *White v. United States*, *supra*, and also *Smallwood v. Gallardo*, 275 U.S. 56, 62, 48 S. Ct. 23, 24, 72 L. Ed. 152, where the Supreme Court said: "When the root is cut the branches fall." (122 F.2d at 209.) (Emphasis added.)

Similarly on point is the *de Rodulfa* case (*supra*, 461 F.2d at 1251-52). There, Congress had passed a statute providing that no "court of the United States shall have power or jurisdiction to review" any decision of the Veterans' Administrator regarding veterans' benefits. This legislation became effective after the district court had entered a judgment under the old law reinstating benefits denied by the Administrator and during the pendency of an appeal to the United States Court of Appeals for the District of Columbia.* In holding that the intervening legislation withdrew jurisdiction from all courts of the United States, itself included, the court observed:

* The awards being appealed, however, had not become final. (461 F.2d at 1252-53.)

There is hardly room for doubting that had Section 211(a) been so amended before these cases had run their course in the District Court, it would have foreclosed any judgment favorable to the claimants. That the judgments antedated the amendment makes for no difference in result as to so much of the judgments as were brought here for review. Amended Section 211(a) is as much a dissolution of our jurisdiction as it was of the District Court's, and "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ." It is clear to us beyond peradventure that these appeals fell when Congress changed Section 211(a). (461 F.2d at 1251.)*

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- * The court's footnote 56 is worth quoting in full for the breadth of authoritative precedent cited in support of the rule that legislative withdrawal of jurisdiction, without reservation as to pending cases, is effective to terminate jurisdiction in such pending cases, even if on appeal:

Bruner v. United States, 343 U.S. 112, 116-117, 72 S. Ct. 581, 584, 96 L. Ed. 786 (1952). . . . This rule has seen frequent application in cases wherein a statute negating jurisdiction became effective pending appeal. Smallwood v. Gallardo, *supra* note 30, 275 U.S. at 60-62, 48 S. Ct. 23, 72 L. Ed. 152; Western Union Tel. Co. v. Louisville & N. R. R. Co., 258 U.S. 13, 18, 22, 42 S. Ct. 258, 66 L. Ed. 437 (1922); Crozier v. Fried Krupp, etc., 224 U.S. 290, 302-309, 32 S. Ct. 488, 56 L. Ed. 771 (1911); Sherman v. Grinnell, 123 U.S. 679, 8 S. Ct. 260, 31 L. Ed. 278 (1887); Railroad Co. v. Grant, 98 U.S. 398, 25 L. Ed. 231 (1879); United States v. Tynen, 78 U.S. (11 Wall.) 88, 95, 20 L. Ed. 153 (1871); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 19 L. Ed. 264 (1869); Insurance

(Footnote continued)

The principle stated in Van Horne and de Rodulfa apply, a fortiori here, for in this case, not only has there been no judgment, but proper in personam jurisdiction over the putative defendants has not been secured.

Finally, no purpose could be served by remanding this case to the district court, even if this Court were to determine, contrary to what we believe to be the law, that the district court erred in dismissing the Complaint. It is important to note in this regard that, as expressly stated in its legislative history, the Immunities Act:

[S]ets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. ([1976] U.S. Code Cong. & Ad. News at 6610.) (Emphasis added.)

Similarly, the United States Department of State

(Footnote continued)

Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 18 L. Ed. 540 (1867); United States v. Preston, 28 U.S. (3 Pet.) 57, 66, 7 L. Ed. 601 (1830). See also Schooner Rachel v. United States, 10 U.S. (6 Cranch) 329, 3 L. Ed. 239 (1810) (expiration of law conferring jurisdiction); Yeaton v. United States, 9 U.S. (5 Cranch) 281, 3 L. Ed. 101 (1809) (same). (461 F.2d at 1251 n.56.) (Emphasis added.)

has made it clear that the Immunities Act provides the "sole and exclusive standards" for making any determinations of sovereign immunity -- now a jurisdictional immunity -- which may arise subsequent to January 19, 1977. As the Department has stated in an official notice published in the Federal Register:

The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977. (41 Fed. Reg. 50,883, 50,884 (1976).)

Thus, if this case were remanded to the district court for further proceedings, the sovereign defendants would immediately and appropriately raise the jurisdictional defenses of the Immunities Act which, in turn, would require the district court to dismiss this action and perhaps lead to another appeal. No purpose would be served, we submit, by adding such an unnecessary procedural step to this case when all the necessary facts for determining the immunity question are presently before this Court in the record.

In sum, the Immunities Act applies to this case and it, alone, requires dismissal of this case and affirmance of the court below.

II. THE DISTRICT COURT CORRECTLY DECIDED
THAT IT LACKED ANY BASIS FOR THE EXER-
CISE OF IN PERSONAM JURISDICTION OVER
THE SOVEREIGN DEFENDANTS.

Aside from the applicability of the Immunities Act to the instant case, the district court was correct in holding that it lacked any proper basis for the exercise of in per-sonam jurisdiction over the sovereign defendants. The district court concisely summed up the whole matter: "This court can find no basis for exercising its jurisdiction over Iran and the Department based on a tortious act which occurred wholly in Iran." (A. 191.)

Unwilling to address themselves to the dispositive issue, plaintiffs here continue to evade it by focusing their attentions upon the irrelevant questions of whether Iran Air is present and doing business in New York and whether Iran Air may be treated as though it were a corporate subsidiary of Iran. Significantly, Iran Air is not a defendant in this case.* Nor can that commercial airline's admitted presence in New York

* Iran Air is, however, the defendant in a separate action brought by these same plaintiffs, on the same set of facts, in the United States District Court for the Southern District of New York. Upton v. Iran National Airlines Corp. No. 75 Civ. 6034 (CMM) (S.D.N.Y., filed Dec. 4, 1975). In suing Iran Air separately, plaintiffs themselves acknowledge that it is an entity existing separately from Iran.

have any bearing at all upon the controlling facts in this litigation that the Mehrabad Airport Terminal is a public building owned and operated by Iran, not by Iran Air, and is located in Tehran, not New York.

Nevertheless, plaintiffs lamely contend that Iran Air's presence in New York somehow vested the district court with personal jurisdiction over Iran and the Department under the "long-arm" provisions of the N.Y. Civ. Prac. Law § 301 (McKinney 1972). They argue that Iran Air may be analogized to a corporate subsidiary of Iran and that:

The Court should, therefore, apply the "doing business" test in this case by analogy to New York cases involving corporations. (App. Br. 11.) (Emphasis supplied.)

Plaintiffs' reliance on New York cases involving corporations in an attempt to establish in personam jurisdiction over a foreign state might seem understandable in the absence of relevant precedents addressed to the latter issue. However, there is recent and authoritative New York precedent construing the applicability of N.Y. Civ. Prac. Law § 301 to a foreign state in a factual context similar to that of the instant case. Vicente v. State of Trinidad and Tobago, 53 A.D. 2d 765, 385 N.Y.S. 2d 83 (1st Dept. 1976), rev'g 83 Misc. 2d 101, 372 N.Y.S. 2d 369 (Sup. Ct. 1975). Indeed, in their brief before the district court in opposition to the

defendants' motion to dismiss, plaintiffs had strenuously contended that Vicente was "almost precisely on point." (Pls' Mem. in Opp. to Defs' Motion to Quash Service and to Dismiss for Lack of Jurisdiction 7.) Now, however, since the Appellate Division unanimously reversed the trial court's decision on which they had relied, plaintiffs are singing a different tune. Vicente, they say, is "inapposite" and "clearly distinguishable" from this case. (App. Br. 14.)

In Vicente, plaintiffs attempted to bring a medical malpractice claim against the State of Trinidad and Tobago in an action based upon the allegedly negligent treatment rendered an infant plaintiff in a hospital which was located in Trinidad and Tobago and which was owned, operated and controlled by the State of Trinidad and Tobago. Vicente presented a factual scenario similar to the present action:

The affidavits of service of process claim personal service upon the Trinidad and Tobago Industrial Development Corporation, and the Trinidad and Tobago Tourist Board. Service upon the Attorney General of Trinidad and Tobago was made by registered mail to Trinidad and Tobago. In each instance, the entity or person served was characterized as an "agent for the State of Trinidad and Tobago, a corporation." (53 A.D. 2d at 76-77, 385 N.Y.S. 2d at 84.)

The lower court had rejected Trinidad and Tobago's contentions that no basis existed for the exercise of in per-

sonam jurisdiction over it. The Appellate Division flatly and unanimously reversed the Special Term's decision, observing as follows:

The evidence adduced at the hearing revealed that while the State may have had an interest in the entities served as a shareholder or otherwise, there was no identity between the State and these enterprises, so that service on any of them could be deemed as service upon the State. Service upon the State's Mission to the U.N. was invalid by virtue of a United States treaty with the United Nations, popularly known as the "U.N. Participation Act of 1945" (22 U.S.C.A. §§ 287 et. seq.)

* * *

Even were we to analogize the State to a foreign corporation rather than treat it as a sovereign, we find that the State had neither been transacting business in New York, within the meaning of CPLR 302(a)(1) (Longines-Wittnauer v. Barnes & Reinecke, 15 N.Y. 2d 443, 261 N.Y.S. 2d 8, 209 N.E. 2d 68), nor was its presence in New York sufficient to grant jurisdiction under CPLR 301 (Frummer v. Hilton Hotels Int., 19 N.Y. 2d 533, 281 N.Y.S. 2d 41, 227 N.E. 2d 851). (385 N.Y.S. 2d at 85.)

Thus, plaintiffs' strained attempts to analogize Iran to the Hilton Hotels Corporation, the de Havilland Aircraft Co, Ltd., and the like (App. Br. 12-13), for purposes of deciding whether in personam jurisdiction could be properly obtained in this case, are both irrelevant and unnecessary. This is a case against a sovereign foreign state, not against a foreign business corporation. Given that fact, wholly different jurisdictional

considerations apply, as demonstrated not only by Vicente and similar decisions by other United States courts,* but also by the principles and rules which were formally codified in the Immunities Act (see Point I, supra).**

The district court in the instant case, no less than the drafters of the Immunities Act, recognized that a foreign sovereign cannot be brought before the courts of the United States to answer and account for an incident occurring in a public airport on its own soil. As pointed out by the district court, it is only where there is a "compelling" factual

* See, e.g., Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965); Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964), cert. denied, 379 U.S. 962 (1965); Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y.), aff'd sub nom., Clay v. Dominion of Canada, 238 F.2d 400 (2d Cir. 1956), cert. denied, 353 U.S. 936 (1957).

** The legislative history of the Immunities Act makes it clear that the cases in which a foreign state would be entitled to immunity under the new Act are to be equated with cases where the necessary contacts for the exercise of personal jurisdiction are lacking. (H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. reprinted in [1976] U.S. Code Cong. & Ad. News 6612.) As stated therein:

Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. (Id.) (Emphasis added.)

nexus between the cause of action asserted and the jurisdiction of a United States court -- such as a voluntary submission to arbitration within that jurisdiction,* or the commission of a physical tort within that jurisdiction** -- that the necessary contacts and circumstances justifying the exercise of personal jurisdiction over a foreign state can exist. (A. 190-91.) Absent such compelling circumstances, the basic principle enunciated by the Supreme Court years ago in Underhill v. Hernandez, 168 U.S. 250 (1897), albeit in the context of the Act of State Doctrine, provides sound and sensible guidance for any question of personal jurisdiction raised here:

Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the act of the government of another done within its own territory. (168 U.S. at 252.) (Emphasis added.)

As plaintiffs' pleadings concede, this case precisely involves an attempt to have the courts of the United States sit in judgment over the acts of Iran with respect to its operation, administration and maintenance of the Mehrabad Airport

* E.g., Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

** E.g., Renchard v. Humphreys & Harding, Inc. 59 F.R.D. 530 (D.D.C. 1973).

in Tehran. (App. Br. 2-3.) If such acts, which occurred wholly outside of the United States, coupled with the foreign state's coincidental stock ownership of a commercial airline operating in the United States, are sufficient to submit that foreign state to the jurisdiction of the courts of the United States, then those courts will indeed have assumed the role of "an international court of claims." Cf. Hellenic Lines, Ltd., v. Moore, 345 F.2d 978, 984 (D.C. Cir. 1965) (Washington, C.J., concurring). Any such result would expand the jurisdictional provisions of the N.Y. Civ. Prac. Law to the point of absurdity. A result clearly not warranted here.

The district court was correct in dismissing the Complaint herein for lack of in personam jurisdiction and should, for this reason too, be affirmed.

III. THE DISTRICT COURT CORRECTLY HELD
THAT SERVICE OF PROCESS HAD NOT
BEEN VALIDLY OR LEGALLY EFFECTED
ON THE SOVEREIGN DEFENDANTS IN
THIS CASE.

The dismissal of the plaintiffs' action must also be affirmed because of their failure to secure effective or lawful service of process upon the defendants. The district court found that, although the plaintiffs' efforts to secure service were numerous, they were ineffective to obtain jurisdiction over the defendants. (A. 190.) Quantity cannot

supplant validity, especially in the highly sensitive area of serving foreign states. Nevertheless, on this appeal, the plaintiffs continue to contend that their efforts were valid, again, as before the district court, ignoring the important deficiencies which prevented effective service.

Plaintiffs first rely upon purported service by the United States Marshal on the Consulate General of Iran in New York. (App. Br. 3-4.) However, the copy of the Summons and Complaint purportedly served by the Marshal was left with a clerical/secretarial employee of the Consulate rather than with a duly designated consular officer. (A. 111.) Moreover, the Marshal did not obtain the prior consent of the Consul General or his designee before attempting to serve process (A.22), in clear violation of international law and treaty obligations of the United States. See Vienna Convention on Consular Relations, art. 31, 21 U.S.T. 77, T.I.A.S. No. 6820; Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965). The asserted telephone call to the Consulate by plaintiff's counsel and subsequent conversation with a clerical/secretarial employee certainly does not satisfy the rigorous requirements of international law respecting the waiver of inviolability of consular premises.

The district court correctly concluded that "service upon a Consul is ineffective to obtain jurisdiction over

the sovereign." (A. 190.) Accord, Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964), cert. denied, 379 U.S. 962 (1965); Clay v. Dominion of Canada, 238 F.2d 400 (2d Cir. 1956), cert. denied, 353 U.S. 936 (1957).

Plaintiffs further rely upon purported service by the Marshal upon the Manager of Iran Air at its offices in New York. (App. Br. 4.) Iran Air, of course, is not one of the defendants herein, nor is Iran Air either the appointed or legal agent for service of process for the defendants. Furthermore, the Marshal's return of service does not list the name of any individual who was actually served at Iran Air, much less the Manager, but does indicate that the employee upon which purported service was attempted "refused to accept service." (A. 112.)

The district court found that Iran Air was neither a ministry nor a department of the Government of Iran, and thus, could not be considered an agent of the sovereign defendants for service of process. (A. 190.) Nor is Iran Air either the appointed or legal agent for service of process for the defendants. Therefore, purported service upon Iran Air was ineffective with respect to obtaining jurisdiction over the sovereign defendants. As already discussed, in Vicente v. State of Trinidad and Tobago (see pp. 21-23 supra), the Appellate Division, in reversing the lower court, specifically rejected the claim that service upon an airline corporation in which the

foreign defendant had a financial interest is effective to obtain jurisdiction over the foreign state.

Finally, plaintiffs rely upon copies of the Summons and Complaint which were sent by certified mail, return receipt requested, to the office of the legal counsel of the Imperial Embassy of Iran in Washington, D.C. and to the Minister of Justice of the Empire of Iran in Teheran, Iran. (App. Br. 4.) These copies of the Complaint were mailed on June 29, 1976, one day before the lawsuit was actually filed with the district court; the enclosed summons was not signed and authorized by the clerk of the district court. Clearly, therefore, these mailings did not constitute effective service. (See Rule 4(a), Fed.R.Civ.Pro.; 2 Moore's Federal Practice ¶ 4.04, at 971 (2d ed. 1975).) Furthermore, no translation of the contents of these documents into the official language of the sovereign defendants (Farsi) accompanied the English versions.*

This description alone shows that plaintiffs' attempts to serve the sovereign defendants were woefully inadequate, failing to comply in various respects with the minimum standards required for valid and effective service of process. However, even if these efforts were somehow technically adequate, and we

* Under the new codified procedure for serving a foreign state, any attempt to do so by mail must include a copy of the summons and complaint translated into the official language of the foreign state. (See Section 1608(3) of the Immunities Act, 28 U.S.C. § 1608(3).)

submit that they were not, no method of service employed by the plaintiffs was sufficient to secure jurisdiction over the defendants.

In an effort to circumvent the above authority, plaintiffs claim that under Rule 83 of the Federal Rules of Civil Procedure, in conjunction with Local Rule 15 of the Southern District of New York, a federal district judge may fashion a procedure for service of process that is consistent with the Federal Rules in cases where a specific rule is not provided. (App. Br. 6-8.) Significantly, although the language of Rule 83 contemplates that the district judge may, in proper circumstances, fashion the procedure in advance of its use, the plaintiffs at no time ever attempted to avail themselves of this rule, assuming that it were applicable. Instead, they argue here by analogy, from other cases in which procedures for service of process were upheld, that the methods they unilaterally adopted satisfy the Federal Rules.

For example, in Republic International Corp. v. Amco Engineers, Inc., 516 F.2d 161 (9th Cir. 1975), the Ninth Circuit upheld service upon the Uruguayan government entity through the issuance of letters rogatory from the United States district court and through physical service upon that government entity in Uruguay. (App. Br. 9.) But, it did so, where the district court had authorized in advance the procedures for service and where service at the special residency of the

defendant Ministry was specifically provided for in the contract which was the subject of the lawsuit. (516 F.2d at 164.) In this case, no procedure for service was judicially authorized in advance nor is there any contract between the plaintiffs and the sovereign defendants which provides, by agreement between the parties, an address or an agent for service of process.

Also, service by registered mail upon both the Embassy of the sovereign defendant in Washington and upon the Ministry of External Relations in the foreign state was deemed sufficient to provide effective service by the court under the "compelling" circumstances encountered in Renchard v. Humphreys & Harding, Inc., 59 F.R.D. 530 (D.D.C. 1973). However, as noted by the district court in its decision in the instant case, the Renchard case involved a tortious act which occurred during the construction of the embassy in Washington, D.C. (A 191.) As acknowledged by the Renchard court itself, that fact presented "a compelling case for upholding service upon the Embassy." (59 F.R.D. at 532.) No such compelling circumstances exist in this case, where all relevant acts occurred in Iran; not a single act occurred in the United States.

Furthermore, the Court in Renchard went to great lengths to assure itself that diplomatic immunity had not been violated by the method of service utilized. (59 F.R.D. at 532.) Here, the actions of the United States Marshal, in

attempting to serve the Iranian Consulate without obtaining the prior consent of the head of the consular post or of his designee, clearly violated the rule of consular immunity, as codified in Art. 31 of the Vienna Convention on Consular Relations, 22 U.S.T. 77, T.I.A.S. No. 6820.* Moreover, it has been judicially recognized that attempted service of process on a foreign state in a manner which violates diplomatic or consular immunity cannot be sanctioned. (See Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 981 (D.C. Cir. 1965).)

Finally, plaintiffs rely primarily on Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Com., 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966), for the proposition that their attempts to serve Iran and the Department were valid and effective. In Petrol, this Court held that under certain limited circumstances appropriate branches of sovereign defendants could be validly served in federal court although no specific Federal Rule provided a method. (360 F.2d at 108.)

* The United States deposited its ratification of the Convention on November 24, 1969; Iran deposited its ratification on June 5, 1975. Art. 31 of the Convention provides:

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or his designee or of the diplomatic mission of the sending State. (Emphasis added.)

However, the Petrol decision explicitly disavowed any holding that "service on the sovereign may be effected on any representative of the sovereign." (Supra at 110.) (Emphasis added.) Rather, because the subject matter of the lawsuit in Petrol concerned a contract between the plaintiff and the sovereign defendant, this Court, in a holding limited to the facts, concluded:

We hold only that service on the branch [of the foreign government] which is a party to the contract sued on is sufficient." (Id.) (Emphasis added.)

No broader service upon a sovereign defendant was authorized by that decision. In the case presented here, unlike Petrol, there is no contractual nexus between the plaintiffs and the sovereign defendants that could possibly provide a basis for service by a similar method.

Lastly, plaintiffs assert that they complied with the provisions of the Immunities Act which set forth certain statutory methods of service to achieve effective service on a sovereign defendant. (See Section 1608 of the Immunities Act, 28 U.S.C. § 1608.) A review of those prescribed methods, however, belies this assertion. In fact, plaintiffs did not follow even a single one in attempting to serve the sovereign defendants.* The plaintiffs' failure to adopt any of these

* Because the statutory methods of service prescribed in the Immunities Act are lengthy, no description of plaintiffs' deficiencies is made here except to point out:

(Footnote continued)

methods serves to underline the clear inadequacy of service of process presented in this case.

In sum, the district court was correct in holding that service of process herein was insufficient to obtain jurisdiction over the sovereign defendants. This, then, provides a further reason for affirmance of the district court's dismissal herein.

(Footnote continued)

1. The statute does not provide for service upon a consulate of the foreign state or upon a corporation in which the foreign state possesses a financial interest; and
2. Where service is made by mail upon the foreign state, the pleadings are to be accompanied by translations into the official language of the foreign state and to be addressed and dispatched by the clerk of the court. (See 28 U.S.C. § 1608(a)(3) and (4).)

CONCLUSION

In light of the enactment into law of the Foreign Sovereign Immunities Act of 1976, which withdrew the subject matter jurisdiction of United States courts from actions against foreign states based on alleged torts occurring and having effects solely within the territory of the foreign state, this Court should dismiss this case for lack of subject matter jurisdiction.

Alternatively, the order of the district court dismissing this case for lack of in personam jurisdiction and invalid service of process should be affirmed.

Dated: May 9, 1977

Respectfully submitted,

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FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

For Legislative History of Act, see p. 7036

An Act to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976".

SEC. 2. (a) That chapter 85 of title 28, United States Code, is amended by inserting immediately before section 1331 the following new section:

“§ 1330. Actions against foreign states

“(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

“(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

“(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.”

(b) By inserting in the chapter analysis of that chapter before—
“1331. Federal question; amount in controversy; costs.”
the following new item:

“1330. Action against foreign states.”

SEC. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

“(2) citizens of a State and citizens or subjects of a foreign state;

“(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

“(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.”

SEC. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

“Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

“Sec.

“1602. Findings and declaration of purpose.

“1603. Definitions.

“1604. Immunity of a foreign state from jurisdiction.

“1605. General exceptions to the jurisdictional immunity of a foreign state.

“1606. Extent of liability.

Foreign
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28 USC 1 note.

28 USC 1330.
Jurisdiction.

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"§§.

"1607. Counterclaims.

"1608. Service; time to answer default.

"1609. Immunity from attachment and execution of property of a foreign state.

"1610. Exceptions to the immunity from attachment or execution.

"1611. Certain types of property immune from execution.

28 USC 1602.

"§ 1602. Findings and declaration of purpose

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 USC 1603.

"§ 1603. Definitions

"For purposes of this chapter—

"(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign state' means any entity—

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

"(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

"(c) The 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"(e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States.

28 USC 1604.

"§ 1604. Immunity of a foreign state from jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 USC 1605.

"§ 1605. General exceptions to the jurisdictional immunity of a foreign state

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of

the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

"(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

"(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

"(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided, That—*

Suit in admiralty.

"(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

Notice.

"(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an in personam

claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

28 USC 1606.

"§ 1606. Extent of liability

"As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 USC 1607.

"§ 1607. Counterclaims

"In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

"(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

"(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 USC 1608.

"§ 1608. Service; time to answer; default

"(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

"(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of

Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

"Notice of suit."

"(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

"(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

"(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

"(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

"(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

"(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

"(C) as directed by order of the court consistent with the law of the place where service is to be made.

"(c) Service shall be deemed to have been made—

"(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

"(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

"(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

"(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

"§ 1609. Immunity from attachment and execution of property of a foreign state 28 USC 1609.

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property

in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 USC 1610.

“§ 1610. Exceptions to the immunity from attachment or execution

“(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

“(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

“(2) the property is or was used for the commercial activity upon which the claim is based, or

“(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

“(4) the execution relates to a judgment establishing rights in property—

“(A) which is acquired by succession or gift, or

“(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

“(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

“(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

“(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

“(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

“(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

"(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

"(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

"(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

"§ 1611. Certain types of property immune from execution

28 USC 1611.

"(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

22 USC 288 note

"(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

"(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

"(2) the property is, or is intended to be, used in connection with a military activity and

"(A) is of a military character, or

"(B) is under the control of a military authority or defense agency."

(b) That the analysis of "PART IV.—JURISDICTION AND VENUE" of title 28, United States Code, is amended by inserting after—

"95. Customs Court.",

the following new item:

"97. Jurisdictional Immunities of Foreign States."

SEC. 5. That section 1391 of title 28, United States Code, is amended by adding at the end thereof the following new subsection: Venue.

"(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

"(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

"(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

"(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

"(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof."

Actions
removable.

SEC. 6. That section 1441 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown."

28 USC 1446.

28 USC 1602
note.

SEC. 7. If any provision of this Act or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Effective date.
28 USC 1602
note.

SEC. 8. This Act shall take effect ninety days after the date of its enactment.

Approved October 21, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94-1487 (Comm. on the Judiciary).

SENATE REPORT No. 94-1310 accompanying S. 3553 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 122 (1976):

Sept. 29, considered and passed House.

Oct. 1, considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 12, No. 43:

Oct. 22, Presidential statement.